support and of the decisions directly overruling it, its force as law is doubtful in jurisdictions adhering to the common law rule. Obviously, in states which have adopted the test of reasonable user such an exception finds no place, since reasonableness is not determined *per se*, but in the light of surrounding circumstances and the rights of other proprietors.[14] In a recent Vermont case, *Lawrie* v. *Silsby* (1909) 74 Atl. 94, the court, therefore, in denying injunctive relief, properly refused to regard interference by one riparian proprietor with the use of the water by another for domestic purposes unreasonable *per se*. The court had previously repudiated the doctrine of an absolute right in the water for domestic purposes.[15]

Ordinarily, for the infringement of riparian rights an injunction will issue as of course,[16] although such relief will be denied if it will not in fact grant substantial relief.[17] This certainly should be the result where there is damage or destruction of property, and balance of convenience would prevent injunctive relief only if the interference has been merely with comfortable enjoyment. This distinction is sometimes drawn where property rights are infringed by a nuisance.[18] The cases in which an injunction is denied although damage is proved are possibly reconcilable on this ground.[19] Apparently to avoid the issuance of an injunction as a matter of right, some courts have, in the public interest, conceded to a city the right to pollute a river with its sewage,[20] and to a mine owner the right to pollute a stream with mine water, [21] without liability, in law or equity, for the damage resulting to lower riparian proprietors. This, however, seems a judicial expropriation of property and is not looked on with favor by many courts.[22] In jurisdictions in which reasonable user is the test the primary question is the infringement of the plaintiff's right, for which infringement it would seem the plaintiff may secure an injunction. However, under this test the denial of injunctive relief may often be justified, since the balance of convenience, in a given case, is a potent factor in the determination of the plaintiff's right.

INCOMPATIBLE AND FORBIDDEN OFFICES.—In most states constitutional or statutory clauses declare that certain offices, called "forbidden," shall not be accepted by incumbents of other offices. Such provisions arise from obvious considerations of policy. For them to operate, the title to the office already held must be *de jure* and not simply *de facto*,[1] and the fact that a person is holding over and performing the duties of his office until his successor has qualified, does

[14]Pitts *v.* Lancaster Mills (Mass. 1847) 13 Metc. 156.

[15]Lawrie *v.* Silsby *supra.*

[16]Atty. Gen. *v.* Birmingham (1858) 4 K. & J. 528; Hennesy *v.* Carmony (1892) 50 N. J. Eq. 616; Pennington *v.* Brinsop Hall Coal Co. (1877) L. R. 5 Ch. Div. 769.

[17]Wood *v.* Sutcliffe (1851) 2 Sim. 162.

[18]6 COLUMBIA LAW REVIEW 458.

[19]Clifton Iron Co. *v.* Dye (1888) 87 Ala. 468; Straight *v.* Hover (Oh. 1909) 87 N. E. 174.

[20]City of Valparaiso *v.* Hagen (1899) 153 Ind. 337.

[21]Penn. Coal Co. *v.* Sanderson (1886) 113 Pa. St. 126.

[22]Straight *v.* Hover *supra.*

[1]People *v.* Turner (1862) 20 Cal. 143.

not in itself disqualify him.[2] Offices which are purely local in their operation are not affected by such statutes, and accordingly municipal offices do not generally fall within the prohibition,[3] though county offices do.[4] Where, however, the municipal office has more than purely local functions, or the state officer could control or influence it, the concurrent holding of the two offices is forbidden.[5] The prohibition takes effect not at the election but at the qualification for the forbidden office, and it would appear that if the time for qualifying for the second office were after the end of the term of the first, its incumbent could hold the second, even though the election took place previous to the termination of the first.[6] Where it is declared that an officer shall not be *eligible* to a certain office, an attempted acceptance of it, has no effect and the first office is retained;[7] but where the statute reads that the two offices may not be *held*, the acceptance of the latter acts *ipso facto* as a surrender of the former.[8] This follows the rule of the common law that the acceptance of an incompatible office acts as instantaneous surrender of the first,[9] and that no proceedings are necessary to vacate it;[10] although the officer is still its *de facto* incumbent, whose acts are valid as regards third parties.[11] This rule is applied even where the office surrendered is superior to the one accepted,[12] and even though the second office is held under a void election and the title to it has failed.[13] An appointment, however, to an office which a person is absolutely ineligible to hold, is void and does not work a forfeiture of the first office.[14] To the general rule that the acceptance of an incompatible office acts as a surrender of the first, there is an exception, that when the first office is one from which the party cannot resign by his own independent act, he must retain the old office and cannot accept the new.[15] Where, however, the appointing power is given to the same body which may accept the resignation, the general rule applies.[16] The reason for this rule seems to be that by accepting the second office, the officer has impliedly made an election to give up the first, and this theory is apparently substantiated by the cases which hold that a person legally in possession of two offices later made incompatible, may choose which he will hold;[17]

---

[2]State *v.* Somers (1887) 96 N. C. 467.

[3]Atty. Gen. *v.* Connors (1891) 27 Fla. 329; Abry *v.* Gray (1897) 58 Kan. 148.

[4]Shell *v.* Cousins (1884) 77 Va. 328.

[5]Atty. Gen. *v.* Detroit (1897) 112 Mich. 145.

[6]See Vogel *v.* State (1886) 107 Ind. 374.

[7]Crawford *v.* Dunbar (1877) 52 Cal. 36.

[8]Magie *v.* Stoddard (1857) 25 Conn. 565.

[9]Rex *v.* Tizzard (1829) 9 B. & C. 418.

[10]Shell *v.* Cousins *supra.*

[11]Hoagland *v.* Carpenter (Ky. 1868) 4 Bush 89; Wilson *v.* King (Ky. 1823) 3 Littell 457.

[12]Milward *v.* Thatcher (1787) 2 D. & E. 81.

[13]King *v.* Hughes (1826) 5 B. & C. 886.

[14]State *v.* Kerns (1890) 47 Oh. St. 566.

[15]King *v.* Patteson (1832) 4 B. & Ad. 9.

[16]State *v.* Brinkerhoff (1836) 66 Tex. 45.

[17]United States *v.* Harsha (1898) 172 U. S. 567.

and that a person elected, at the same meeting, to two incompatible offices, takes the one for which he first qualifies.[18]

Logically it would seem, that where a state prohibition exists against the concurrent holding of a state and a federal office, and a federal officer accepts a state office, that this would *ipso facto,* act as a surrender of the federal office; it being assumed that it is one from which he could divest himself at his own election. As a matter of law and policy, however, it is generally held, that a federal officer is not eligible to accept a state office,[19] and that he cannot remove this disqualification by resigning, unless such resignation precedes his appointment to the state office.[20] On the other hand, the acceptance by a state officer of a federal office, acts at once as a surrender of the state office.[21] This result is probably reached on principles of public policy and because, the state having no jurisdiction over a federal officer, could not remove him, so that it might become possible for a person to hold without molestation, two offices absolutely prohibited by the state constitution.[22] Where no statutes forbid it offices may be held, both under the federal and state governments, if not incompatible at common law.[23]

Such incompatibility, it has been well settled, does not consist in mere physical impossibility to perform;[24] there must be an inconsistency in functions so that one would hinder or influence the operations of the other.[25] It seems a fair question, however, whether when the offices are such that they cannot be executed at the same time, and no deputy can be appointed, they are not so opposed to each other as to be incompatible. In a recent case, *State* v. *Gebert* (Oh. C. C. 1909) 54 Oh. Law Bull. No. 48, the court, unhampered by any statutes or provisions of the state constitution, held the offices of mayor and federal congressman compatible. It therefore followed logically that an acceptance of the position of congressman did not deprive the defendant of the office of mayor.

---

[18]Cotton *v.* Phillips (1875) 56 N. H. 220.

[19]Rodman *v.* Harcourt (Ky. 1843) 4 B. Mon. 224.

[20]*In re* Corliss (1876) 11 R. I. 638; decision of the lower court in De Turk *v.* Comw. (1889) 129 Pa. St. 151, which is submitted as the better view on principle.

[21]Davenport *v.* Mayor (1871) 67 N. Y. 456; People *v.* Kelley (1899) 77 N. Y. 503.

[22]See Rodman *v.* Harcourt *supra.*

[23]Bryan *v.* Cattell (1864) 15 Ia. 538.

[24]Bryan *v.* Cattell *supra.*

[25]Milward *v.* Thatcher *supra;* King *v.* Jones (1831) 1 B. & Ad. 677; People *v.* Green (1874) 58 N. Y. 295. See also opinion of the lower court, 5 Daly 254. *Contra,* State *v.* Buttz (1877) 9 S. C. 165, 175.